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SETTING US UP FOR DISASTER: THE SUPREME COURT'S DECISION IN *TERRY V. OHIO*

Thomas B. McAfee*

INTRODUCTION

The controversies spawned by the Supreme Court's decision in *Terry v. Ohio*¹ are just about as expansive as the decision's implications for the development of Fourth Amendment doctrine.² And it was recently observed that it is perhaps the most criticized Fourth Amendment decision since the modern Supreme Court belatedly incorporated the amendment, and eventually the exclusionary rule.³ Fortunately, there is neither time nor space to address and fully resolve all of these controversies, or even to determine whether the case was just wrongly decided; the somewhat narrower thesis of this Article is that the long-term impact of *Terry* on the development of Fourth Amendment law—and on the whole idea of judicial supervision of law enforcement's Fourth Amendment activities—has been truly disastrous, as the Burger, Rehnquist, and Roberts Courts have all taken the case and run with it.

I. RELEVANT CONTROVERSIES WE NEED NOT RESOLVE

An initial controversy worth noting, even if not seeking to resolve here, concerns the validity of a conventional defense of the Court's holding in *Terry*. Many criminal procedure teachers note that it may have been just as plausible, in terms of history and precedent, to hold that the Fourth Amendment simply does not apply to the relatively informal, and usually quite brief, detention we label a "stop."⁴ Instead, the Court answered the question whether police needed only "reasonable suspicion" to justify a stop, or needed the "probable cause" required for a formal arrest. So, one perspective on *Terry* is that it made a positive contribution in just rejecting the idea that a "stop-and-frisk" is not a

* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I appreciate the support provided by the law school for scholarly projects. I also thank Ramir Hernandez for his excellent research assistance and editorial suggestions.

¹ 392 U.S. 1 (1968).

² For a brief treatment of the most salient of these controversies, see *infra* text accompanying notes 4–27.

³ Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 299 (2010) [hereinafter Rosenthal, *The Case Against Terry*].

⁴ "Ohio argued that because the stop was not a full-scale arrest, it did not require any justification under the Fourth Amendment." DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 43 (1999) [hereinafter COLE, EQUAL JUSTICE].

“seizure” or a “search” because such an intrusion did not amount to a “technical arrest” or a “full-blown search.”⁵

Justice Schaefer of the Illinois Supreme Court stated that *Terry* rejected the idea that the “provisions of the Fourth Amendment are subject to verbal manipulation.”⁶ And the Court stated its “intent to harness the practice [of stop and frisk] within the reasonableness standard of the Fourth Amendment.”⁷ From this perspective, *Terry* has been defended as being based on the “proportionality principle,” as it equally rejected the idea that courts should wholly defer to informal police decision-making just as it held that every seizure is not subject to the requirement of probable cause.⁸ But even if the original decision in *Terry* could be justified as an appropriate application of the “proportionality principle,”⁹ a chief proponent of that defense has concluded that the principle “seems to have been ignored even in cases purportedly applying *Terry*.”¹⁰

Similarly, there is room for debate as to whether, even if a standard requiring less than probable cause was appropriate for evaluating a stop and frisk, the Court adequately analyzed and applied that standard to the facts in the case. Lewis Katz, for example, argued that *Terry* “dismally failed to strike an adequate balance between effective law enforcement and individual freedom,” less by its formulation of a standard as in its applying it so as to strike the balance

⁵ Wayne R. LaFare, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 51 (1968) [hereinafter LaFare, “*Street Encounters*”]; *Terry*, 392 U.S. at 16–17 (reasoning that it tortures the language to characterize a frisk as a mere “petty indignity” and hence not any sort of “search” at all); see also LaFare, “*Street Encounters*,” *supra*, at 73 (arguing that “*Terry*’s value lies in the Court’s firm assertion that police action under this new power will be scrutinized as closely as other enforcement activities touched by the Constitution”); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1133 (1998) [hereinafter Sundby, *Probable Cause*] (a *Terry* critic observing that both *Terry* and *Camara v. Municipal Court*—another decision requiring less than probable cause, as to administrative searches—“were efforts to make the Fourth Amendment as expansive as the Court thought possible under the circumstances”).

⁶ LaFare, “*Street Encounters*,” *supra* note 5, at 52.

⁷ Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 428 (2004) [hereinafter Katz, *A Revisionist View*].

⁸ Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053 (1998) [hereinafter Slobogin, *The Proportionality Principle*]. There are, of course, important commentators who concur that the “proportionality principle” was grounded in too great a willingness to defer to police exercise of discretionary judgment, or at least failed to articulate a sufficiently narrow exception to a general requirement of probable cause. *E.g.*, Sundby, *Probable Cause*, *supra* note 5, at 1135 (arguing that *Terry*’s difficulty grows from “the long-term consequences” of “holding in terms of a broadly framed reasonableness balancing test;” whereas *Terry* itself described the reasonable suspicion standard as stating “a narrow departure from the norm of probable cause,” the lower standard subsequently “has taken on a life of its own”).

⁹ A number of commentators, including Professor Sundby, argue that *Terry* has been understood as “uncoupling” the Warrant Clause and the Reasonableness Clause, thus opening the door to a general resort to the Reasonableness Clause, and a balancing test, rather than seeing stop and frisk as embodying a narrow exception to the general rule in favor of the Warrant Clause and the Probable Cause requirement. Accord Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1310 n.112 (1998) [hereinafter Maclin, *Fourth Amendment Legacy*].

¹⁰ Slobogin, *The Proportionality Principle*, *supra* note 8, at 1055.

“completely in favor of the police.”¹¹ Equally important, on this view, “the balance has been further tipped in favor of police by later Supreme Courts.”¹² In *Terry* itself, its critics contend, the evidence relied upon to justify the detention supplied a weak justification for the legal conclusions reached by the Court.¹³ One contention, for example, was that Officer McFadden acted on a “hunch,” rather than articulable, reasonable grounds for suspicion, based on evidence “which might have warranted his continuing interest in [the suspected parties] but certainly not a lawful seizure based upon such paltry and contradictory information.”¹⁴

At the same time, of course, at least some commentators have written as though the Court’s “suspicion” standard was fairly applied and at least had the potential for being developed to strike the right Fourth Amendment balances.¹⁵ Despite this, however, even some defenders of the original decision in *Terry* suggest the Court initially struck the right balance, but subsequently erred in applying the balancing test in a manner that advanced an ad hoc agenda.¹⁶

A related point is that the Court in *Terry* came close to punting on the “critical threshold question” concerning “when the stop occurred,” an issue that needed expanded treatment.¹⁷ Instead, the Court moved quickly to considering the justification for the less intrusive search called a “frisk.” In not really confronting the problem of defining when temporary detentions are justified, the Court more or less stated a “suspicion” standard, but “without pausing to consider whether a police suspicion test could (or would) be cabined in future cases.”¹⁸ Justice Harlan, concurring, contended that, in LaFave’s words, “the issue of the officer’s right to stop should be resolved before any other questions are reached.”¹⁹ Considering that *Terry* was a substantial effort, consisting of a majority opinion, two concurring opinions, and a dissent, the Court’s initial effort on the stop and frisk issue “might well lead one to wish that the Court had written less and said more.”²⁰

¹¹ Katz, *A Revisionist View*, *supra* note 7, at 424.

¹² *Id.*

¹³ *Id.* at 431–34; accord Maclin, *Fourth Amendment Legacy*, *supra* note 9, at 1301 (critiquing whether Officer McFadden’s testimony was adequate to establish reasonable suspicion and to justify the frisk); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 248 (2010) (underscoring that the officer did not even stop Terry, despite describing him as seemingly “casing” a jewelry store, until he “stopped to talk to a white man;” observing, in addition, that “Cleveland police lore held that when a black man and a white man got together, they were likely to be planning a crime”).

¹⁴ Katz, *A Revisionist View*, *supra* note 7, at 456.

¹⁵ See, e.g., LaFave, “*Street Encounters*,” *supra* note 5, at 42, 47–48, 55.

¹⁶ E.g., Slobogin, *The Proportionality Principle*, *supra* note 8, at 1095.

¹⁷ Katz, *A Revisionist View*, *supra* note 7, at 444–45. Professor LaFave observed, for example, that the opinion “does *not* give separate consideration to the grounds for the seizure,” compared to the frisk (or “search”). LaFave, “*Street Encounters*,” *supra* note 5, at 64; accord Katz, *A Revisionist View*, *supra* note 7, at 445 (observing that the Court never resolved whether a detention occurred prior to the contact involving the frisk). For thoughtful analysis of how the Court might have gone about more adequately developing the “reasonable suspicion” standard, see LaFave, “*Street Encounters*,” *supra* note 5, at 51–84.

¹⁸ Maclin, *Fourth Amendment Legacy*, *supra* note 9, at 1309.

¹⁹ LaFave, “*Street Encounters*,” *supra* note 5, at 63. See also *Terry v. Ohio*, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring).

²⁰ LaFave, “*Street Encounters*,” *supra* note 5, at 46.

And in the long run, the *Terry* Court's failure to adequately address the "stop" justification encouraged a later Court "to hold that Fourth Amendment seizures occur far later in a police-citizen encounter, thus delaying citizens' . . . power which has resulted in an erosion of civil liberties and an arguably unrestrained sanctioning of police powers."²¹ In light of the Court's treatment, some contend that *Terry* reflected a resignation to the exercise of police discretion, whatever standard was devised.²² *Terry*'s critics thus conclude that the Court "opened the door for the subsequent restrictions on individual rights by its standardless decision in *Terry*."²³ But even defenders of the original decision often contend that "the Court has expanded the breadth of a *Terry* stop well beyond its original, limited beginnings."²⁴ So even if the ultimate merits of the holding in *Terry* remains unresolved, there are powerful reasons to conclude that its expansion over time has had a negative effect on developing Fourth Amendment doctrine. Thus *Terry*'s narrow right to "stop," or briefly detain someone based on reasonable suspicion, eventually became a "broad arrest-like power[]," a power that enables police to move passengers and to "force suspects to lie prone on the ground."²⁵ This expansion has led to granting police power to require individuals to speak in identifying themselves and the like. It has justified, for example, police ordering both drivers and passengers out of automobiles during a stop.²⁶ So, even defenders of the original decision are known to contend that "it is not the mere use of the reasonableness balancing test that must be reevaluated but the manner in which courts employ the reasonableness test."²⁷

II. *TERRY*'S CONTRIBUTIONS TO THE PRACTICE OF RACIAL PROFILING

Even some of the additional controversies arising from *Terry* are ones that we need not fully analyze and totally resolve. One is whether the Court in that case adequately confronted how a police suspicion standard might affect Fourth Amendment rights of blacks and other disfavored minorities. Another is whether the Court has adequately developed the "reasonable suspicion" standard to avoid excessive police discretion that yields undue racial profiling. Beyond these difficult questions concerning the decision itself and its application, however, it is quite clear that the thrust of the *Terry* decision, as construed and explicated over time and in how it has connected with other criminal proce-

²¹ Katz, *A Revisionist View*, *supra* note 7, at 449.

²² *Id.* at 443.

²³ *Id.* at 429 (emphasis added).

²⁴ E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 309 (2005) [hereinafter Estrada, *Criminalizing Silence*] (emphasis added). For an analogous and extended argument that the Court has all but abandoned "the proportionality principle" that justifies its holding in *Terry* in its applications of the case's doctrine, see Slobogin, *The Proportionality Principle*, *supra* note 8.

²⁵ Estrada, *Criminalizing Silence*, *supra* note 24, at 279.

²⁶ *Id.* at 285.

²⁷ *Id.* at 314. The balancing, on this view, must in the process give due weight to individual privacy interests. *Id.* at 315. Justice Jackson, we are reminded, observed that "[t]he rights ensured by the Fourth Amendment] . . . are not mere second-class rights but belong in the catalog of indispensable freedoms.'" *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting)).

ture doctrine, has lent powerful support to race-based enforcement of the nation's laws.

A. *The Terry Decision and Racialized Policing*

There is no question that the Court in *Terry* recognized that the problem of race relations was relevant to justifying the application of the Fourth Amendment to stops and frisks.²⁸ Indeed, the Court attempted to formulate a standard by which courts might appropriately oversee police conduct that impacted on minorities; and this was no doubt a reason it rejected the argument that the Fourth Amendment just did not apply to the action of stop and frisk at all.²⁹

If there is a complaint about the *Terry* Court's treatment of the risk and danger of racial profiling—which included its acknowledgement of the “frequent[] complain[ts]” by minority groups of their “wholesale harassment by certain elements of the police community”—it is that the Court centered its analysis on whether that risk justified what it characterized as “a rigid and unthinking application of the exclusionary rule.”³⁰ Excluding the evidence, Chief Justice Warren reasoned, would be a “futile protest against practices which it can never be used effectively to control,” a protest that “may exact a high toll in human injury and frustration of efforts to prevent crime.”³¹ This meant, for the Court, that although the judiciary should “guard against police conduct which is over-bearing or harassing,” society may be required to rely on “other remedies than the exclusionary rule to curtail abuses for which that sanction [the exclusionary rule] may prove inappropriate.”³² The decision to focus on the likely effectiveness of the exclusionary rule arguably was in part based on, and reinforced, the Court's clear reluctance to examine closely the prof-

²⁸ *Terry v. Ohio*, 392 U.S. 1, 14–15 & n.11 (1968).

²⁹ As suggested by earlier analysis, the Court conceived itself as supporting judicial regulation of law enforcement and, as some commentators stated it, rejecting the view that the “requirement of probable cause is an inflexible standard which demands precisely the same amount of evidence no matter what kind of police action is involved.” LaFave, “*Street Encounters*,” *supra* note 5, at 54.

³⁰ *Terry*, 392 U.S. at 14–15.

³¹ *Id.* at 15. The point is well taken when stops are instrumental to preventing crime, but more debatable as to actions the Court itself characterizes as “harassing.” Compare LaFave, “*Street Encounters*,” *supra* note 5, at 62 (contending that “it would be harsh medicine” to exclude evidence derived from reasonable stops “in order to administer an indirect and ineffective slap” at illegitimate and improper stops), with Maclin, *Fourth Amendment Legacy*, *supra* note 9, at 1313 (contending that the “effectiveness of the exclusionary rule's deterrent function should not control the substantive content of the Fourth Amendment;” otherwise, the exclusionary rule tail is wagging the Fourth Amendment dog).

³² *Terry*, 392 U.S. at 15. A related controversy is whether the conclusion that law enforcement officials will almost invariably act if they fear the potential for being victimized by violence cuts against application of the Fourth Amendment and exclusionary rule or in their favor. Compare *Terry*, 392 U.S. at 15 (expressing view that use of the exclusionary rule in stop and frisk cases could easily amount to a “futile protest against practices which it can never be used effectively to control” and “may exact a high toll in human injury and frustration of efforts to prevent crime”), with Maclin, *Fourth Amendment Legacy*, *supra* note 9, at 1319 (though we would expect that “police officers would always take steps to protect themselves in situations they viewed as threatening to their safety,” it does not follow that we should not prohibit “the admission of evidence in a criminal trial where officers discover weapons or contraband as a result of an illegal search”); see also *id.* at 1317–20.

ferred justification for the Fourth Amendment “seizure” the Court called a “stop.”³³ Moreover, the Court’s reliance on the difficulty of applying the Exclusionary Rule in this context “purports to examine the cost of applying the constitutional protection without ever considering the costs of not applying the constitutional protection.”³⁴

B. Racial Profiling and the Development of the Reasonable Suspicion Standard

Whatever one makes of the original *Terry* decision’s achievements and failures, and the possibilities it generated—perhaps especially with respect to race-based decision-making as a part of our criminal justice system—it is reasonably clear that the *Terry* stop-and-frisk doctrine has lent itself too readily to supporting law enforcement efforts rooted in stereotypical generalizations and racial profiling. So the developments in constitutional criminal procedure growing directly out of *Terry* have done nothing but strengthen the tendency of the criminal justice system to work so as to harm the just rights and interests of racial minorities.³⁵ This remains true notwithstanding that *Terry* itself, and its most direct implications for law enforcement actions, have had strenuous defenders.³⁶

The further we go along, the clearer it becomes that there is widespread “racialized policing,” what we have labeled as “racial profiling,” and that its pervasive presence is so important in part because it is measurable.³⁷ Professor

³³ This reluctance fit nicely together with the Court’s failure to fully formulate and apply the standard for determining when temporary detentions are justified. *See supra* notes 19–21 and accompanying text.

³⁴ Katz, *A Revisionist View*, *supra* note 7, at 451. Relying on the difficulties of applying the exclusionary rule in the stop context also reinforces that granting wide discretion to police makes racial profiling that much more likely. One strong reaction focused right here:

If the Court truly could not tell precisely when the seizure took place, that uncertainty demonstrates a complete lack of understanding of the relationship on the street between police and citizens, especially between police and black citizens. It is an understanding that the present Court totally lacks, but we had expected better of the Warren Court.

Id. at 446.

³⁵ For analysis and evidence demonstrating the harmful impact of *Terry* on the law of constitutional criminal procedure, and negative implications for the treatment of racial minorities, and especially African Americans, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60–77 (2010) [hereinafter ALEXANDER, *THE NEW JIM CROW*].

³⁶ For a summary treatment and response to some prominent defenses of the original decision in *Terry* and its impact on constitutional criminal procedure law, see *infra* notes 88–110 and accompanying text.

³⁷ *E.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 14 (2011). Capers observes that a Maryland State Police report showed that blacks comprise 72.9 percent of all drivers stopped and searched along Interstate 95, even though they comprise 17.5 percent of drivers violating traffic laws on the same route. *Id.* at 14–15. Police in Los Angeles were 127 percent “more likely to search stopped blacks than to search stopped whites.” *Id.* at 15. Similarly, in New York 30 percent of those stopped were black, often “more than ten times their percentage of the overall population” in relevant precincts. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 66–67 (2009) [hereinafter Capers, *Policing, Race, and Place*].

Tonry points out that the research “concludes that police stop blacks disproportionately often on sidewalks and streets and generally find contraband at lower rates for blacks than for whites.”³⁸ The wide use of racial profiling is reinforced by *Terry*’s holding as well as by the way the suspicion standard has been expansively applied over time.³⁹ The Supreme Court itself initially formed some limits on what could constitute reasonable suspicion, emphasizing that personal conduct in a “high-crime area,” or associating with known drug users, did not of themselves constitute evidence yielding reasonable suspicion.⁴⁰

Yet as the years passed, Professor Harris found that courts regularly find adequate grounds for suspicion based on factors similar to those initially found insufficient.⁴¹ Thus “[m]inority group members can be not only stopped, but subjected to a frisk without any evidence that they are armed or dangerous, just because . . . [of] the neighborhoods in which they work or live.”⁴² Illustrative of the discretion granted to police by courts applying *Terry* doctrine is the frequent reliance by law enforcement on “investigative profiles,” as in their use of so-called drug courier profiles. The consequence is that, despite the lack of thorough record-keeping, the “evidence overwhelmingly suggests that police frequently stop and frisk African Americans and Hispanic Americans based on very little evidence.”⁴³ The net result “is the effect these stops have in widening the racial divide in the United States.”⁴⁴

Such profiles often rely on apparent correlations between specified behaviors and criminal activity.⁴⁵ Even though the Supreme Court has ruled that conformance with some elements of a profile may not constitute reasonable suspicion, requiring “independent judgment” by courts,⁴⁶ it has also reasoned

³⁸ MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 50 (2011). He also observes that blacks are not only stopped more frequently than whites, but are also more likely to be frisked, despite lower success rates in discovering weapons. *Id.* at 51. Tonry also points to evidence supporting the conclusions that blacks do not use or sell drugs more than whites, but are more likely to be arrested, convicted, and imprisoned. *See id.* at 57–73.

³⁹ For a brief summary of some of the ways *Terry* has been applied to expand police powers and discretion, see *supra* notes 21–27 and accompanying text.

⁴⁰ COLE, *EQUAL JUSTICE*, *supra* note 4, at 43.

⁴¹ David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 *IND. L.J.* 659, 672–75 (1994). *See* COLE, *EQUAL JUSTICE*, *supra* note 4, at 43–44.

⁴² David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 *U.C. DAVIS L. REV.* 1, 44 (1994) (emphasis omitted). The discretion recognized in law enforcement has been powerfully reinforced by *Terry* and its progeny, but also by the Court’s broad interpretation of the scope of the automobile exception to the warrant requirement. ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 61 (by 1990–1991 “it had become clear that a major shift in the relationship between the citizens of this country and the police was underway”). In one dissenting opinion, Justice Stevens observed that in 30 cases involving narcotics decided in the nine previous years, the Court had upheld searches without warrants in all but three cases. *California v. Acevedo*, 500 U.S. 565, 600 (1991) (Stevens, J., dissenting). He concluded that “this Court has become a loyal foot soldier in the Executive’s fight against crime.” *Id.* at 601.

⁴³ Harris, *supra* note 41, at 681.

⁴⁴ *Id.*

⁴⁵ Slobogin, *supra* note 8, at 1085.

⁴⁶ David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *GEO. L.J.* 1059, 1077 (1999) [hereinafter Cole, *Discretion and Discrimination*]. *See, e.g.*, *Reid v. Georgia*, 448 U.S. 438 (1980). *See also*

that appellate courts should grant “due weight” to a trial court’s conclusion that an officer drew “inferences based on his own experience,” and was therefore “credible” and “reasonable.”⁴⁷ So, lower courts often defer to law enforcement. Moreover, considering that law enforcement officers can frequently engage in police/citizen “encounters” that do not amount to Fourth Amendment seizures governed by the *Terry* standard, drug investigators in particular rely heavily on drug courier profiles in conducting their investigations.⁴⁸ Yet “drug courier profiles are often so expansive that they operate much like the traffic code—virtually anyone the police choose to stop will fit multiple factors of the profile.”⁴⁹

C. *Beyond Terry Itself—Judicial Approval of Various Forms of Racial Profiling*

Applications of the *Terry* “reasonable suspicion” doctrine are a tricky business to be sure, and even among those seeking to avoid “racialized law enforcement” it is not clear that an important part of the answer is simply rejecting, and advocating the overruling of, its holding.⁵⁰ But there is little room for doubt that the use and application of the *Terry*-based “reasonable suspicion” doctrine can greatly expand or contract the exercise of police discretion, with the expansion of such discretion lending itself to race-based decisions, and otherwise arbitrary practices, by law enforcement.⁵¹ We have generally expanded the discretion granted to law enforcement through the decision in *Terry* and its progeny. Moreover, the Court over time has come to distinguish between *Terry* “stops” and police/citizen “encounters” that are not governed or limited by the Fourth Amendment at all. Racial minorities have been significantly disadvantaged by the discretion granted to law enforcement in Fourth Amendment doctrines related to traffic stops, various forms of police sweeps, the definition of a “search,” and the idea of “consent searches.” One cannot help but see a close relationship between the analysis, goals, and appli-

CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 87 (4th ed. 2003).

⁴⁷ *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

⁴⁸ See Cole, *Discretion and Discrimination*, *supra* note 46, at 1077–79. For a brief summary of how courts distinguish between, and thus decide on, “encounters” and “seizures,” see WHITEBREAD & SLOBOGIN, *supra* note 46, at 273.

⁴⁹ Cole, *Discretion and Discrimination*, *supra* note 46, at 1077. They thus provide “an all-purpose checklist to justify stopping anybody the law enforcement officer selects.” *Id.* at 1079. But notice that an officer testified that at least 75 percent of those followed and questioned at an airport were black. *Id.*; see also ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 71 (profiles provide an excuse for stopping whomever police choose to) (citing COLE, *EQUAL JUSTICE*, *supra* note 4, at 49).

⁵⁰ For example, a strong advocate of construing the Fourth Amendment to further equal citizenship, Professor Bennett Capers, doubts whether we could or should “re-think” *Terry*, or that modifying it would “do much to override the implicit biases officers, and indeed all of us, have.” Capers, *Policing, Race, and Place*, *supra* note 37, at 73.

⁵¹ See, e.g., Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1844–45 (2004) [hereinafter LaFave, *The “Routine Traffic Stop”*].

cations of *Terry* doctrine and these related doctrines that have greatly expanded police discretion in their pursuit of the war on drugs.⁵²

1. *The Uses and Scope of Terry Stops*

Exemplary was the en banc decision of the Seventh Circuit in *United States v. Childs*.⁵³ There, the circuit court reasoned that even lengthy and scrutinizing questioning about matters unrelated to the purpose of the traffic stop, in an effort to investigate “other offenses,” has no potential for exceeding the scope of a legitimate (or “reasonable”) “detention” under *Terry*—so long as it does not significantly add to the length of the stop.⁵⁴ Even the standard and ordinary requirement stated in *Terry*, and fully developed subsequently, that such “stops” should “promptly” determine the validity of the suspicion giving rise to the stop, was viewed as having no significant application in *Childs*. The circuit court concluded that the “duration limitation” imposed by *Terry* simply did not apply to those facts because the vehicle had been stopped because of a broken windshield, and partly based on a seat-belt violation, which created “probable cause” that a traffic violation had occurred. Even as it acknowledged that additional investigative activities could become “unreasonable” under the Fourth Amendment, the court still reasoned that police were not limited to promptly completing the business directly related to the basis for the initial stop.⁵⁵

By contrast, Professor LaFave argued that if law enforcement’s justification for detention is centered on the grounds for the traffic stop, it remains true that “[w]hat the Constitution requires is that the entire process remain reasonable.”⁵⁶ Consequently, he contends, “*Terry* limitations apply without modification even to those traffic stops made upon probable cause.”⁵⁷ But what LaFave found most disturbing about *Childs* was that the decision constituted “a positive encouragement to the police to engage in pretextual activity—making stops whose sole legal justification is traffic regulation in order to seek out drugs when grounds are lacking to detain for a narcotics investigation.”⁵⁸ In LaFave’s mind, *Childs* begins a descent “down the slippery slope.”⁵⁹ As problematic as one might find the application of *Terry* to the facts of *Childs*, of still greater concern is that *Childs* suggests a strategy for avoiding the “suspicion”

⁵² Thus Professor Alexander observes that the Supreme Court’s rules, in applying the Fourth Amendment, “have ensured that anyone, virtually anywhere, for any reason, can become a target of drug-law enforcement activity.” ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 62.

⁵³ 277 F.3d 947 (7th Cir. 2002) (en banc).

⁵⁴ *Id.* at 951–54. The case is usefully discussed at LaFave, *The “Routine Traffic Stop,” supra* note 51, at 1865–74.

⁵⁵ LaFave, *The “Routine Traffic Stop,” supra* note 51, at 1869.

⁵⁶ *Id.* at 1868.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1870.

⁵⁹ *Id.* at 1872. LaFave observed that the Court has warned “that because ‘unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure,’ it ‘is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments’” to fulfill the potential for detecting crime. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 1886 (1886)).

standard altogether while still pursuing an aggressive investigation exceeding altogether the purpose of the stop.

2. *The Use of Pretextual Automobile Stops*

Relying on the probable cause warranting a stop for an identified traffic violation is used, even by detectives who are part of an anti-drug task force, to justify pursuing their drug investigations.⁶⁰ Professor Cole reports that “[t]he use of traffic stops as a pretext for investigating other crimes, particularly drug offenses, is extremely common, and blacks and Hispanics are disproportionately targeted by the practice.”⁶¹

“Because virtually anyone who drives a car is likely to violate one or more of the myriad traffic regulations that govern the roads, this rule gives the police license to use traffic stops to engage in encounters not otherwise justified by objective, individualized suspicion.”⁶² These pretextual traffic stops—often lacking probable cause, or even reasonable suspicion, that those “stopped” have committed drug crimes—are often combined with aggressive officer requests to search the contents of the automobile to ensure that drugs are not being transported.⁶³

The significance of *Terry* to this practice is illustrated by the course of events recounted in Cole’s book on equal justice in our criminal justice system. One drug task force officer found drugs in an automobile and justified the stop based on the suspicion generated by a “drug courier profile.” When the district attorney refused to prosecute because the use of the profile centered on race and the use of out-of-state license plates—based on the legal conclusion that “reasonable suspicion” could not be shown—the officer simply switched to using traffic violations to justify detaining drivers and passengers whom he deemed suspicious.⁶⁴ Professor Cole noted that in alleged pretextual stop cases,

⁶⁰ COLE, *EQUAL JUSTICE*, *supra* note 4, at 36.

⁶¹ *Id.* Along similar lines, Professor Alexander observes that several courts have “emphasized that granting police the freedom to stop, interrogate, and search anyone who consented would likely lead to racial and ethnic discrimination.” ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 65.

⁶² Cole, *Discretion and Discrimination*, *supra* note 46, at 1076. Professor Butler stated that when he went on a “ride-along” with a DC officer, they played a game of selecting a car and, within a few blocks, finding a reason to stop the car for some kind of violation. Butler, *supra* note 13, at 252. *Accord* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (observing that “[s]ince virtually everyone violates traffic laws at least occasionally, the upshot of these decisions is that police officers, if they are patient, can eventually pull over almost anyone they choose”).

⁶³ ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 65 (observing that “consent searches are valuable tools for the police only because hardly anyone dares to say no”). For more on the inherently coercive use of consent searches as an ostensibly “voluntary” investigative technique, see *infra* notes 80–81 and accompanying text.

⁶⁴ See COLE, *EQUAL JUSTICE*, *supra* note 4, at 37–38. Professor Cole observed that a “subsequent lawsuit” was settled for \$800,000 after a showing that of over 400 people stopped based on this race-based profile, not one was “charged with a traffic offense or arrested for drugs.” *Id.* at 38. Similarly, it has been estimated that in a DEA traffic stop/consent search operation, no illegal drugs were found in 95 percent of the stops, while 98 percent of the searches were based solely on the driver’s verbal “consent.” ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 70.

from 1993 to 1996, 80 percent of those stopped were minority drivers.⁶⁵ This sort of pretextual use of alleged traffic violations not only grants almost limitless power to law enforcement to target suspects to investigate, it virtually invites racialized policing.

In spite of the inherently unreasonable use of pretextual traffic stops to justify thorough drug investigations of those deemed suspicious, the Supreme Court has held that there is no Fourth Amendment basis for challenging such detentions or investigations.⁶⁶ So police need not show reasonable suspicion of a drug crime to justify making a traffic stop, and officers may stop anyone who infringes even the most minor traffic code, though the traffic violation is being exploited to stop the driver for some other reason.⁶⁷ The probable cause to believe that the law, in the form of traffic regulations, had been violated, justified the traffic stop even if its purpose was to investigate a racial minority vaguely suspected of drug use or dealing. The officers freely admitted that they had no interest in enforcing the traffic law; and the Court held that law enforcement could constitutionally make a stop for a traffic violation even if the officer had no legal authority under local regulations to make the stop and no intention to enforce the law violated.⁶⁸

The Supreme Court had in previous decisions seemingly recognized “that pretextual activity sometimes violates the Fourth Amendment.”⁶⁹ But *Whren* characterized the defendant’s “pretext” argument as based on a contended-for finding of the wrong “motivation,”⁷⁰ even though it was rather clearly based on the officer’s alleged “deviation from usual practice.”⁷¹ Hence, “[p]retext stops, like consent searches, have received the Supreme Court’s unequivocal blessing.”⁷² The net result of the Court’s utter rejection of any pretext doctrine is that law enforcement officers are not only granted wide discretion with great potential for abuse,⁷³ but are virtually invited to engage in racialized policing. As Professor Capers observed, when laws like traffic regulations grant great discretion to law enforcement officers, they set up the use of “racial incongruity” as sufficient for officers to justify stopping minority motorists.⁷⁴ Little wonder that one minority “was stopped . . . while traveling through a predominantly white neighborhood . . . for driving ‘too slowly.’”⁷⁵

⁶⁵ COLE, *EQUAL JUSTICE*, *supra* note 4, at 40. Even so, he reports defendants in many of these cases argued that the stops were motivated by race, and these claims “invariably failed.” *Id.*

⁶⁶ *Whren v. United States*, 517 U.S. 806 (1996).

⁶⁷ Cole, *Discretion and Discrimination*, *supra* note 46, at 1076. Thus Professor Butler pointed out that in *Whren* the “young black motorist” was “pulled over for, among other things, waiting too long at a stop sign.” Butler, *supra* note 13, at 252.

⁶⁸ COLE, *EQUAL JUSTICE*, *supra* note 4, at 39. A police regulation forbade plainclothes officers to enforce traffic laws absent a threat to public safety. *Id.*

⁶⁹ LaFave, *The “Routine Traffic Stop,” supra* note 51, at 1853.

⁷⁰ *Whren*, 517 U.S. at 812.

⁷¹ LaFave, *The “Routine Traffic Stop,” supra* note 51, at 1854.

⁷² ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 66.

⁷³ And thus “police are allowed by the courts to conduct fishing expeditions for drugs on streets and freeways based on nothing more than a hunch.” *Id.* at 88.

⁷⁴ I. Bennett Capers, *Policing, Race, and Place*, 44 *HARV. C.R.-C.L. L. REV.* 43, 70 (2009).

⁷⁵ *Id.* at 71.

Sadly as well, the impact of such practices becoming pervasive features of American life within its major cities is the promotion of distrust and resentment along racial lines. Professor Capers sums up what is ultimately at stake:

[W]hen the police patrol neighborhoods and use racial incongruity as a factor for initiating an encounter or a stop and frisk, it sends the expressive message that neighborhoods have a color. This in turn means that certain individuals belong, and others are by default cast as aliens, intruders, suspect. The task then is to find a way of policing that allows officers to do their job, reducing crime, and yet at the same time does not have the unintended consequence of discouraging or inhibiting integration.⁷⁶

3. *The Use of Train and Bus Sweeps*

It has become a common drug investigation tactic to employ bus and train sweeps to discover drug carriers and dealers.⁷⁷ Such sweeps are not based on probable cause to believe that drug carriers will be found, nor even on any articulable, individualized (and hence reasonable) suspicion;⁷⁸ they are rooted in a mere awareness that drugs are often carried on buses and trains. Drug investigators rely quite clearly on the *Terry*-based distinction between “stops”—that constitute “seizures” under the Fourth Amendment—and mere police-citizen “encounters” where the police conduct is not viewed as Fourth Amendment activity at all.⁷⁹ It is also a standard law enforcement tactic in such cases to request of those deemed “suspicious”—because they are the right age, sex, or race—that they allow law enforcement to search their luggage.⁸⁰ These so-called “consent searches” work much like determining that a police initiated citizen encounter is not a “stop,” or any “detention” at all; so long as police do not engage in coercive behavior—using force or directly asserting authority to compel cooperation—search requests do not even implicate the Fourth Amendment. Note, however, that in practice, though all persons theoretically have the “right” to refuse to allow a search, “virtually everybody” in fact consents to such searches.⁸¹

⁷⁶ *Id.* at 72.

⁷⁷ ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 63; COLE, *EQUAL JUSTICE*, *supra* note 4, at 16.

⁷⁸ In *Terry* and subsequent cases, the Court has “held that a ‘seizure’ is unreasonable without some articulable reason, specific to the individual, for suspecting crime.” COLE, *EQUAL JUSTICE*, *supra* note 4, at 18. While formal arrests require probable cause, “all seizures require at least some degree of *individualized* suspicion.” *Id.*

⁷⁹ Professor Cole notes:

Not every encounter between a citizen and a police officer . . . is a ‘seizure’ that must be justified under the Fourth Amendment. Otherwise, police officers would not be able to approach anyone on the street without first having grounds to suspect criminal conduct. . . . [T]he Court had ruled that a police officer ‘seizes’ an individual when ‘by means of physical force or show of authority, [the officer] has restrained [the citizen’s] liberty,’ and that the relevant question is whether a reasonable person in the citizen’s shoes would feel ‘free to disregard the [officer’s] questions and walk away.’

Id. (footnote omitted).

⁸⁰ ALEXANDER, *THE NEW JIM CROW*, *supra* note 35, at 63 (bus sweeps invariably include “interviews” that lead to “consent searches”).

⁸¹ COLE, *EQUAL JUSTICE*, *supra* note 4, at 16 (“One officer testified that he had searched 3,000 bags without once being refused consent.”).

In a case challenging this police conduct,⁸² the Supreme Court reversed a state court ruling excluding drug evidence based on the coercion inherently present when officers stand above a bus passenger, question him and request to search his luggage, and give him the dilemma of either cooperating with police or removing himself from the bus in the middle of nowhere and separating himself from his luggage.⁸³ The Court acknowledged that Bostick “would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment,” but reasoned that his being so “‘confined’ . . . was the natural result of his decision to take the bus,” not a sign of police-imposed coercion.⁸⁴ The result “is that police are free to engage in dragnet-like searches of buses and trains, in settings where it is extremely difficult for any citizen to refuse to cooperate.”⁸⁵

Of even greater concern than the discretion to act, this grant to law enforcement is the inevitable impact of such constitutional policy on groups most likely to be harmed by such discretionary decisions. Professor Cole observes:

There are few available statistics on the racial breakdown of police stops. . . . A search of all reported federal bus and train sweep cases from January 1, 1993, to August 22, 1995, found that, of fifty-five cases in which the defendant’s race could be identified, thirty-six were black, eleven were Hispanic, one was Asian, one was Filipino, and six were white. As Justice . . . Marshall stated in dissent in *Bostick*, ‘the basis of the distinction to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.’⁸⁶

The selective enforcement that this application of constitutional policy promotes creates a double standard they may “reflect a savvy political judgment,” in that if “such suspicionless treatment” were applied to “everyone, there would likely be sufficient political will to curtail the practice politically, either by legislation or by community pressure on police departments.”⁸⁷

III. EFFORTS TO DEFEND *TERRY* AND ITS IMPACT ON THE LAW

During the last twenty years or so a number of scholars, both criminal procedure legal scholars and scholars on the practice of policing, have contended that aggressive community policing appropriately involves the exercise of broad discretion by law enforcement.⁸⁸ Such scholars have argued “that con-

⁸² *Florida v. Bostick*, 501 U.S. 429 (1991).

⁸³ COLE, *EQUAL JUSTICE*, *supra* note 4, at 18–19. Cole emphasizes the totality of police behavior—boarding the bus en route, “standing over” passengers, blocking the exits, displaying their badges and guns, grilling passengers with questions—and concludes that treating the response as “voluntary” is “patently fictional,” allowing police to use the “rubric of ‘consent’ . . . to engage in a wide range of nonconsensual, coercive intrusions on privacy without any basis for individualized suspicion.” *Id.* at 19–20.

⁸⁴ *Bostick*, 501 U.S. at 435–36.

⁸⁵ COLE, *EQUAL JUSTICE*, *supra* note 4, at 19.

⁸⁶ *Id.* at 21 (footnote omitted) (quoting *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting)). Cole, *Discretion and Discrimination*, *supra* note 46, at 1076 (noting that in the referenced search of sweep records, “nearly ninety percent of those stopped were minorities”).

⁸⁷ COLE, *EQUAL JUSTICE*, *supra* note 4, at 21.

⁸⁸ These developments in scholarly advocacy are nicely summarized in Professor Cole’s “response” to these arguments in favor of wider police discretion. See Cole, *Discretion and*

stitutional skepticism toward discretion in policing has outlived its utility.”⁸⁹ Several of these scholars have placed little focus on *Terry* doctrine and the cases developing it; rather, they have simply made the general point that acceptance of a broad range of police discretion may facilitate more effective law enforcement, and constitutional principle should not become a barrier to effective efforts to fight crime.⁹⁰ Based on the view that aggressive stop-and-frisk actions by local police present effective tools for fighting crime, some contend “that courts should defer to inner-city communities that choose to empower police with broad discretion to respond to crime.”⁹¹ Quite recently, for example, Professor Rosenthal argued that “there is a case to be made that *Terry* deserves a significant share of the credit for the enormous decline in violent crime that the nation has experienced in the past two decades or so.”⁹²

An immediate problem with the thesis that recognizing the need for police discretion presents us with a “coming crisis in criminal procedure,” is that judicial doctrine aimed at restricting police has been significantly curtailed in recent decades.⁹³ Concerns for avoiding the granting of undue discretion to police officers has clearly played a role in the development of important criminal procedure doctrine; but the chief characteristic of the last thirty years of criminal procedure jurisprudence has been an increasingly deferential stance toward the exercise of broad police discretion. Consider Professor Cole’s summary of the development of more deferential rules:

The Court has left the police free of Fourth Amendment constraints by finding no reasonable expectation of privacy in many situations, by finding that many police-citizen encounters are consensual, and by upholding consent searches without any warning of the right to say no. These rules allow the police to approach and investigate people for any reason or none at all; the officer’s discretion is wholly unregulated. In other settings, the officer’s discretion is subject only to the most deferential oversight, as in ‘stop and frisk’ encounters, which may be predicated on ‘reasonable suspicion,’ a standard that itself defers substantially to the officer’s on-the-scene judgment and experience. The ‘pretext stop’ doctrine permits the police to rely pretextually on any traffic code infringement to stop persons for other reasons, and the Court has expressly rejected the argument that persons in traffic stops should be

Discrimination, *supra* note 46, at 1063–70. Perhaps the most recent, and quite elaborate, defense of discretionary community policing, that includes a careful defense of the decisions in *Terry* and progeny, is found at Rosenthal, *The Case Against Terry*, *supra* note 3.

⁸⁹ Cole, *Discretion and Discrimination*, *supra* note 46, at 1066 (citing Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998)).

⁹⁰ See, e.g., Kahan & Meares, *supra* note 89, at 1158–59.

⁹¹ Cole, *Discretion and Discrimination*, *supra* note 46, at 1066.

⁹² Rosenthal, *The Case Against Terry*, *supra* note 3, at 302.

⁹³ Hence the “new discretion scholars” do not really contend for radical change, but are offering justification for the status quo. Rather than law unduly limiting discretion, and thereby creating a criminal law crisis, the problem “runs in precisely the opposite direction.” Cole, *Discretion and Discrimination*, *supra* note 46, at 1073. The discretion we have granted has led to great abuses, including “routine everyday indignities suffered by young black men subjected to police encounters because of the color of their skin.” *Id.* at 1074. This creates a “crisis in legitimacy,” where “members of the minority community are far more skeptical of the criminal justice system than members of the white community, and for good reason.” *Id.* Recognizing even more police discretion “would exacerbate this crisis.” *Id.*

told they have the right to leave before being asked to submit to a search of their car.⁹⁴

A question thus raised is whether one can defend *Terry* doctrine as it has developed, acknowledging that it has come to extend virtually limitless discretion to law enforcement, while still insisting that it validly construes the Fourth Amendment.

Much of the defense of *Terry* and progeny is premised on the purely pragmatic assessment that it helps in the fight against crime. Consider the defense offered by Professor Rosenthal. On one hand, he acknowledges quite clearly that the Fourth Amendment “does not permit police to do anything to secure public order,” and that a consequence is that courts must find a “reasonable accommodation” of liberty and the governmental interest in promoting security.⁹⁵ But he concluded that it simply is not true that *Terry* misapprehends the “constitutional balance between liberty and order.”⁹⁶ And, as we have seen, he credits the use of stop-and-frisk tactics with sparking a decline in violent crime.⁹⁷ Though he almost stipulated that declaring portions of America to be zones free of the Fourth Amendment would amount to permitting “police to do anything to secure public order,” he all but acknowledges that *Terry* doctrine has in practice come virtually to establish such a principle.

In earlier analysis, we noted that courts have come to show unusual deference to police judgments to stop and/or frisk based on the neighborhood the “suspect” works or lives in.⁹⁸ In an earlier article, Rosenthal acknowledged that courts “grant police even greater leeway in ‘high crime areas,’” permitting detentions and searches “on highly ambiguous conduct merely because that conduct occurs in what the police can fairly characterize as a ‘high crime neighborhood.’”⁹⁹ He concluded: “Thus, the Court has effectively granted the police greater authority to search and seize in many minority neighborhoods than they have elsewhere.”¹⁰⁰

Rosenthal also acknowledges that a report of the state attorney general in New York, where the successes of “community policing” have been highly touted, “expresses some skepticism about the New York Police Department’s compliance with the Fourth Amendment.”¹⁰¹ The report estimated that 15 percent of the forms filled out after stops did not articulate facts sufficient to justify the stop, while even more were inadequate in supplying information that

⁹⁴ *Id.* at 1071–72 (footnotes omitted).

⁹⁵ Rosenthal, *The Case Against Terry*, *supra* note 3, at 346. He contends that *Terry* was “precisely” engaged in this process of accommodation. *Id.*

⁹⁶ *Id.* The case does pose “a high risk of error when it comes to stop-and-frisk tactics,” and “accepts the risk that officers may stop innocent people,” he acknowledged, but he does not find the “error rate” troubling in light of the virtue of permitting the investigation of potential crime. *Id.* at 346–47 (internal quotation marks omitted).

⁹⁷ *See id.* at 302 and accompanying text.

⁹⁸ *See supra* notes 40–42 and accompanying text.

⁹⁹ Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 150 (2000) [hereinafter Rosenthal, *Gang Loitering*] (quoting Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 115–24 (1999)).

¹⁰⁰ *Id.*

¹⁰¹ Rosenthal, *The Case Against Terry*, *supra* note 3, at 330 n.210.

would enable one to determine whether reasonable suspicion was present.¹⁰² It is difficult to avoid the conclusion that the difficulties aggressive community policing has complying with the Fourth Amendment is related to the deference shown to law enforcement discretion by courts in implementing the doctrine announced in *Terry*.

Although Professor Rosenthal admits that the discretion granted to law enforcement has contributed to the tendency by police to rely on racial profiling—reflecting perhaps in part that the discretion it “grants police facilitates discrimination by officers too willing to believe that persons of color are up to no good”¹⁰³—he still contends that, though police do “hit” racial minorities at higher rates than whites, the differences may reflect that racial minorities “offend at higher rates than non-minorities”—which leads them “to be subject to *Terry* tactics at higher rates.”¹⁰⁴

Even here, however, Rosenthal’s admissions about police conduct going well beyond confronting violent crime generated by open-air drug markets in the inner cities, supplies its own critique of *Terry* doctrine and its impact on law enforcement practices. He acknowledges, for example, that there is “substantial potential for serious abuse” under “quite ordinary laws, such as traffic regulations.”¹⁰⁵ And, of course, the use of pretextual traffic stops is one of the consistently abusive practices of contemporary law enforcement.¹⁰⁶ Moreover, he admits that it is not uncommon in the world outside the inner cities, for middle and upper class persons of color to be “stopped because they appear ‘out of place’”—a practice that should be rejected on a simple cost/benefit analysis.¹⁰⁷ Nonetheless, even this analysis yields an anomalous conclusion: the strongest opponents of such profiling, the “wealthier minorities” who can live “where the costs of aggressive policing likely exceed their benefits,” are reasonably opposed to “aggressive policing” simply because they do not face “the Hobbesian world of drug dealers and gangs.”¹⁰⁸

But if it is so clear that the pretextual traffic stops and the use of widespread de facto segregation often violate a meaningful idea of Fourth Amendment “reasonableness,” especially when practiced in America’s suburban neighborhoods, one has to wonder whether aggressive stop-and-frisk tactics can

¹⁰² *Id.* Rosenthal also acknowledged that another study, for another city, found that 46 percent of pat-down searches were unconstitutional. *Id.*

¹⁰³ *Id.* at 347.

¹⁰⁴ *Id.* at 348. Moreover, the prosecution rates of minorities for drug offenses reflects in part that open-air drug markets targeted by police “are disproportionately found in inner-city minority communities.” *Id.* at 349. Since such drug markets “stimulate violent crime,” and are subjected to aggressive stop-and-frisk tactics “aimed at reducing violent crime,” higher minority search rates “provide little indication of official discrimination.” *Id.*

¹⁰⁵ Rosenthal, *Gang Loitering*, *supra* note 99, at 151. In the same article, he also fully admits that “the evidence of racial profiling is becoming increasingly potent.” *Id.*

¹⁰⁶ See *supra* notes 60–76 and accompanying text.

¹⁰⁷ Rosenthal, *The Case Against Terry*, *supra* note 3, at 356.

¹⁰⁸ *Id.* Elsewhere, Rosenthal contended that public order laws are not “immune to abuse,” but we need to consider “why aggressive policing is so frequently undertaken in inner-city minority communities.” Rosenthal, *Gang Loitering*, *supra* note 99, at 156. “One fundamental reason that aggressive policing in the inner city is here to stay is that its residents want criminality in their midst to be suppressed.” *Id.* The demand for greater law enforcement in minority communities “cannot be overstressed.” *Id.*

appropriately be based on the “neighborhoods” individuals live or work in. Under Rosenthal’s justification, law enforcement appropriately relies on “highly ambiguous conduct” of members of high crime communities to warrant stop and frisk practice.¹⁰⁹

IV. CONCLUSION

Professor Cole presents the real issues raised when we justify racial profiling selectively by emphasizing the presumed effectiveness of aggressive policing in America’s inner cities. The danger is that we can easily wind up implementing a “double standard” in evaluating the legality of police conduct:

[C]onstitutional doctrines that allow the police to use their discretion to enforce double standards along race or class lines corrode the law’s legitimacy, particularly among minorities and the poor. The loss of legitimacy in turn impedes law enforcement in multiple ways. People alienated from the system are less likely to provide leads to the police, to testify as witnesses for the prosecution, to serve on juries when called, and to convict guilty defendants when they do serve. More fundamentally, people who distrust the fairness of our legal system have less incentive to play by the rules, and accordingly, double standards in law enforcement actually contribute to criminal conduct in those neighborhoods that are already at most risk of criminal behavior for socioeconomic reasons.¹¹⁰

As we confront the inevitable tension presented by the need for law enforcement discretion and the importance of upholding the law’s legitimacy in minority communities, it is crucial that we not underestimate the significance of the latter. As Cole writes: “Legitimacy is all the more important in modern policing, which relies substantially on developing and maintaining informal ties with the community to do its work effectively.”¹¹¹

¹⁰⁹ See Rosenthal, *Gang Loitering*, *supra* note 99, at 150.

¹¹⁰ Cole, *Discretion and Discrimination*, *supra* note 46, at 1091 (footnote omitted). Professor Cole freely acknowledges that we must strike a balance between police discretion that is essential and the limitations that are critical to maintaining the law’s legitimacy:

The critical importance of both legitimacy and discretion to effective policing creates a conundrum. On the one hand, to do community policing well the police must be vested with substantial discretion. On the other hand, the very vesting of that discretion may undermine the law’s effectiveness, to the extent that it fosters the appearance or reality of discrimination and robs the law of its legitimacy. Accordingly, there is no silver bullet in this area. The police cannot of course be denied all discretion. But neither can we give up on judicial control of discretion on the theory that the political process will take up the slack, as the new discretion scholars advocate.

Id. at 1092.

¹¹¹ *Id.*